IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1364 of 2004

with

CRIMINAL MISC.APPLICATION No 8049 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMAD LAGHU DAFER LAKHA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1364 of 2004

MR VA PITHIA for Appellant No.

Mr K C Shah, Addl.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

The present appellant has challenged the judgment and order of conviction and sentence passed against him dated 24.6.2004 in Sessions Case No.23 of 2003 in this appeal which has been admitted by us by our order dated 14.9.2004. He has also preferred Criminal Misc.Application No.8049 of 2004 under section 389 of Criminal Procedure Code, 1973 praying for the suspension of the said sentence and to release him on bail pending hearing of the appeal. We have directed him to produce on record copy of all the relevant evidence and the learned Advocate appearing for the applicant has duly complied with our direction.

2. Having gone through the judgment as well as the copies of the evidence, it appears, prima facie, that the findings recorded by the trial court holding the appellant guilty of committing offence punishable under section 302 is erroneous. We have therefore, at the request of the learned Advocates appearing for the parties, namely; Mr V A Pithia, learned Advocate for the appellant and Mr K C Shah, learned APP appearing for the respondent-State of Gujarat, taken up this appeal for its final disposal today itself.

3. According to the prosecution, the appellant along with original accused no.2 Rasul Ladhu Dafer, on 8.12.2002 picked up a quarrel with the deceased-Malde Bhikhabhai Muliasia Mer on account of some money transactions. During that time, the appellant got excited and gave a knife blow below the abdomen of the deceased and caused him injury which ultimately proved fatal. Information with regard to the incident was given to Vanthali police station which registered the offence at CR.No.I.155/2002 and commenced the investigation against the present appellant and original accused no.2. During the investigation, they were arrested. On completion of the overall investigation, police submitted charge sheet in the Court. The Learned Magistrate, who in turn, committed the case to the Court of 3rd Fast Track Judge and Addl.Sessions Judge at Junagadh since the offence punishable under section 302 of IPC is exclusively triable by a Court of Sessions. It was numbered as Sessions Case No. 23/2003. At the trial, the prosecution examined 18 witnesses in support of his case. It also produced documentary evidence in the form of FIR, inquest panchnama as well as other panchnamas,

post mortem notes etc. At the end of the recording of the evidence, further statements of the appellant as well as accused no.2 were recorded under section 313 of Cr.P.C. Their defence appears to be that of general denial. At the end of the trial, the learned Judge, by the aforesaid judgment, acquitted original accused no.2-Rasul Ladhu Dafer of all the charges levelled against him. The learned Judge, however, held the appellant guilty of committing offence punishable under section 302 of IPC and sentenced him to suffer R.I. for life and to pay fine of Rupees One thousand. In default, to suffer further R.I. for 15 days. No separate sentence was imposed for offence punishable under section 135 of Bombay Police Act. In this appeal the same has been challenged.

4. We have carefully gone through the record of this appeal. We have also carefully considered the submissions advanced by Mr Pithia, learned Advocate for the appellant as well as Mr K C Shah, learned A.P.P. Mr Pithia has fairly conceded that so far as the involvement of the appellant in the present incident is concerned, he hardly has any case. In other words, he does not challenge that part of the finding of the learned trial court. He however, assails the conviction recorded under section 302 of IPC by the learned Judge. According to him, considering the fact that this is a case of single blow and that too the blow was not on vital part of the body, there was no intention to cause death. Therefore, there won't be any offence under Section 302 of IPC. He has submitted that at the most the case would fall under section 304 Part II of IPC.

5. As against that, Mr K C Shah, learned APP has supported the judgment and has submitted that the findings of the trial court with regard to the appellant having caused offence under section 302 of IPC is just and proper and it is not required to be disturbed. Mr Shah has therefore, submitted that this appeal may not be allowed and it should be dismissed.

6. With a view to reappreciate the evidence on record and since Mr Pithia has supplied copies of the deposition of the witnesses, we have perused the same. We have also perused the judgment of the learned trial Judge. As stated earlier, Mr Pithia, learned Advocate for the appellant has fairly conceded that so far as the involvement of the appellant in the present incident is concerned, he has hardly any scope to challenge the case of the prosecution. He has mainly concentrated on the nature of the offence alleged to have been committed by

the appellant. However, we have also perused the evidence of PW 6-Visabhai Mohanbhai, Exh.34, Virambhai Mohanbhai, PW 10, Exh.42 and PW 8, Arjanbhai Lakhmanbhai, exh.36. According to Visabhai and Virambhai, when they were removing the deceased in injured condition to the hospital in a taxi, he told them that it was the appellant who had inflicted knife blow on him. The defence has not been able to elicit from this witness any fact which may favour the defence. The third witness Arjanbhai has however, turned hostile and he has not supported the prosecution. This evidence coupled with medical evidence on record which corroborates the oral testimony of the aforesaid two witnesses namely; Visabhai and Virambhai. We hardly see any reason not to accept the prosecution case with regard to the involvement of the appellant in the present incident. In our opinion, the prosecution has successfully established that it was the appellant who had inflicted knife blow on the deceased. If that is so, the next question for our consideration is whether the finding given by the trial court against the appellant to the effect that he is responsible for committing the offence under section 302 of IPC is proper or not.

7. For deciding this question, we may first turn to the medical evidence. It is in the form of oral as well as documentary evidence. Dr. Bhavnaben Dhoriya, PW 1 exh.21 has deposed before the trial court that she had performed the post mortem examination of the deceased of this case on 9.12.2002 at about 10 a.m. and the same was completed at 11.30 a.m. During the autopsy, she had found external injury which has been duly recorded in Column No.17 of the post mortem notes. It has described as "Fresh incised wound of about 8 cm x 1 cm x 6 cms cavity deep on the right thigh region. She has further noted down the cause of death as haemorrhage and shock due to 2 cms cut in deep femoral artery. Thus, she has not noted any other external injury. She has also noted the internal condition of the deceased which does not show any damage having been caused to any important internal organ. Though in the examination-in-chief, this witness has stated that if femoral artery is cut, there is hardly any chance of survival and the injury could be sufficient to cause death in the cross examination, she has stated that if immediate treatment is given to the injured he/she can survive. Thus even according to this witness, if immediate treatment is made available to the injured, it is not necessary that the injured should die in all cases. Thus, it is clear that the said offence does not fall under section 300 of IPC. The further question to be decided is whether the offence would be

under section 304 Part I or Part II since for the aforesaid reason it would be culpable homicide not amounting to a murder. Though the medical evidence shows that the injury was likely to cause death, whether the appellant intended to cause that injury, will have to be considered by us. Admittedly, the weapon used by the appellant is knife. Knife is such a weapon that normally if the user wants to inflict fatal blow on the vital part of the body, he would select stomach or left side of the chest etc. However, in the present case, only one blow has been inflicted and that too on the right side just below abdomen. In that view of the matter, it can safely be concluded that the appellant neither entertained any intention to cause fatal injury nor even injury which is likely to cause death. This shows that the offence would not even fall under section 304 part I.

8. In our opinion, when the appellant had inflicted blow with a dangerous weapon and that too just below the abdomen, he would certainly have knowledge that if the blow had landed just above the spot aimed at it would have resulted into fatal injury. No doubt, in the present case, the injury that has been caused to the deceased has ultimately resulted into his death, but it cannot be said that the appellant intended to cause fatal injury as stated above. However, when the dangerous weapon is used in the manner in which the appellant had inflicted blow on the deceased, we can well be saddled with the knowledge of his act. If that be so, this act would be covered under section 304 part II. For the aforesaid reasons, we do not agree with the conclusion drawn by the learned trial court that the offence committed by the appellant is under section 302 of IPC.

9. For the foregoing reasons, this appeal is partly allowed. We quash and set aside the finding of the trial court that the offence committed by the appellant is under section 302 of IPC. Instead, we hold that the appellant is guilty of committing offence under section 304 part II of IPC. We accordingly modify the order of punishment of R.I. for life also and impose the sentence of R.I. for five years. The sentence of fine imposed by the trial court will remain as it is. In default, the appellant has to undergo further R.I. for 15 days. We do not disturb the findings recorded by the trial court for the offence punishable under section 135 of the Bombay Police Act. We may make it clear that the appellant shall get the benefit of set off for the period he has already spent in prison. The muddamal is ordered to be disposed of as per the directions of the trial

court.

10. In view of the order passed in this appeal, Criminal Misc.Application no.8049 of 2004 does not survive and the same is accordingly disposed of. Notice discharged.

[Kshitij R Vyas, J.]

[Akshay H Mehta, J.]

msp